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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. JOEL FIGUEROA, Defendant and Appellant.	C082107, C083534 (Super. Ct. Nos. 12F02011 & 09F07893)

Defendant Joel Figueroa was charged with 11 counts of lewd or lascivious acts on a child under 14. A jury found him guilty of two counts, acquitted him of five, and deadlocked on the remaining four. On appeal, defendant contends reversal is required based on five instances of prosecutorial misconduct, all arising from the prosecutor's closing argument. We will affirm.

BACKGROUND

The 11 charged counts of lewd or lascivious acts involved three alleged female victims: two sisters and their cousin. Ultimately, guilty verdicts were returned only as to one of the three girls.

The victim, defendant's stepdaughter, was 16 at the time of trial. She testified that defendant often would stroke her arms, legs, and lower torso before touching her vagina with his hand when her mother was at work. She testified he had touched her vagina more than 10 times and answered, "I'm not sure" when asked if it was more than 20. After the second or third grade, the touching varied: "Sometimes it was weekly; sometimes it was monthly." The acts occurred more often when he was drinking. Sometimes, he went months without touching her.

Some instances stuck in the victim's mind. One time, defendant told her not to let him do anything to her. Then after he touched her, he told her it was her fault. Another time, just before the victim was 13, defendant took her to buy an iPad after he molested her.[1] When the victim was in middle school, she asked defendant, "[W]hy do you hurt me?" hours after he had touched her. He said he did not mean to and promised never to do it again. She told him he had said that to her before.

She eventually told her mother about the touching in a letter. The letter, dated February 4, 2012, said that while her mother intended to protect her, she had failed to protect her in her own home all these years—she had "scars" her mother did not know about. After her mother read the letter, the victim eventually told her defendant had been touching her.

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[1] The victim, however, could not recall what had happened during the molestation—though she recalled the room in which it took place.

In February 2012, a special assault forensic evaluation (SAFE)[2] interview of the victim was conducted. The victim's sister, brother, and cousin also were interviewed. The jury heard recordings of the sister's and cousin's SAFE interviews. The victim's interview recording, however, was not offered by the prosecution.[3] The victim did, however, testify to some of what she had said at the interview. The jury also heard testimony from a detective who attended the victim's SAFE interview and testified to what was said. Excerpts of the SAFE interview also were read to the jury, after the parties stipulated the victim had made statements at her SAFE interview that were inconsistent with her trial testimony (Evid. Code, § 1235).

At trial, the victim was asked about the last time defendant had touched her. She could not recall exactly when, but said it was before Christmas in the middle of eighth grade, which was the Christmas before the SAFE interview. She could not remember what had happened that time.

The jury found defendant guilty of two counts of lewd or lascivious acts (Pen. Code, § 288, subd. (a)). It acquitted him of five other counts and deadlocked on the remaining four, on which a mistrial was declared. Defendant was ultimately sentenced to an 11-year aggregate term.

DISCUSSION

On appeal, defendant contends reversal is required based on five instances of prosecutorial misconduct, all occurring during closing argument. As defendant acknowledges, his trial counsel failed to object to the statements now challenged on

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[2] A SAFE interview is a forensic interview of a child 14 or under by a Child Protective Services employee trained in interviewing children.

[3] The victim was 13 at the time of her SAFE interview; her sister was 10 and her cousin was nine. (See Evid. Code, § 1360, subd. (a) ["In a criminal prosecution where the victim is a minor, a statement made by the victim when under the age of 12 describing any act of child abuse . . . is not made inadmissible by the hearsay rule"].)

appeal. That forfeits the challenge. (See *People v. Wrest* (1992) 3 Cal.4th 1088, 1105 ["by failing to interpose any objection at trial, defendant waived any error or misconduct emanating from the prosecutor's argument that could have been cured by a timely admonition"].)

Defendant asks that we, nevertheless, exercise our inherent discretion to reach the issue of prosecutorial misconduct or alternatively to review it as a claim of ineffective assistance of counsel. We decline to exercise discretion but will address it as a claim of ineffective assistance. As such, defendant must show (1) his trial counsel's performance "fell below an objective standard of reasonableness . . . under prevailing professional norms," and (2) he was prejudiced by the deficient performance. (See *Strickland v. Washington* (1984) 466 U.S. 668, 687-688, 691-692 [80 L.Ed.2d 674, 693-694, 696].)

I

The Claim of Griffin *Error*

Defendant first contends the prosecutor committed misconduct under *Griffin v. California* (1965) 380 U.S. 609 [14 L.Ed.2d 106] (*Griffin*) by indirectly arguing to the jury that it should consider defendant's decision not to testify. He maintains the prosecutor's invitation to the jury to ask itself "who sat in this chair and told us what happened[?]" was an indirect reference to defendant's failure to testify. We disagree.

A. *Background*

Early in his closing, the prosecutor explained that defendant "remains innocent until proven guilty" by proof beyond a reasonable doubt. Citing CALCRIM No. 220, he explained that reasonable doubt is "proof that leaves you with an abiding conviction that the charge is true." He continued: "The instruction goes on to say that the evidence need not eliminate all doubt, because everything in life is open to some possible or imaginary doubt. So what that stands for is just this idea that we weren't there, we didn't see it happen. The only people that were there and saw it happen were the people that sat in

this chair and testified, and that is really what we want [to] focus our attention on is the folks that testified in this trial."

The prosecutor continued: "We don't have a video of the crime occurring. We don't have a doctor that came in and said I examined the victims and saw X, Y, or Z. That is not what this type of case is. This case really comes down to witness credibility, and we are going to talk about that."

He then explained the jury's role: "[I]t's the jury's job to figure out what the facts are in this case." To that, he said: "[I]t's very important . . . that you only use the evidence that is presented in this case. And the way to sort of think about that is just to ask yourself when you are deliberating and when we are comparing and when we are considering the evidence is to say *who sat in this chair and told us what happened*. If we are looking at documentary evidence, it has to have something that has got an exhibit sticker on it, . . . and it would be received into evidence, and you will be able to look at that when you deliberate. It could be the DVDs of the interviews of [the sister and the cousin]. Those are items of evidence that can be reviewed." (Emphasis added.)

He went on: "An important thing to remember is that nothing that the attorneys say is evidence. . . . So attorneys will ask a lot of questions of people that are sitting in the witness chair. If the answer is no, you really aren't supposed to assume that the question was true if it was sort of asked in a way that assumed the truth . . . . [I]t is our job to look at what the evidence is and to make a credibility decision of those witnesses. So just because a question was asked doesn't mean it's true."

B. *Analysis*

Under *Griffin*, the prosecution may not comment on a defendant's failure to testify. (*Griffin, supra,* 380 U.S. at p. 615; *People v. Gomez* (2018) 6 Cal.5th 243, 299.) Nor may the prosecution argue that certain testimony or evidence is uncontradicted, if only the defendant could deny or contradict it. (*People v. Gomez*, *supra*, 6 Cal.5th at p. 299.) But nothing precludes the prosecution from commenting on the state of the evidence. (*Ibid.*)

And " 'brief and mild references to a defendant's failure to testify without any suggestion that an inference of guilt be drawn therefrom, are uniformly held to constitute harmless error.' " (*People v. Turner* (2004) 34 Cal.4th 406, 419-420.)

Here, the challenged statement did not constitute *Griffin* error and therefore no claim of ineffective assistance could arise from it. Placed in context, we read the statement, "who sat in this chair and told us what happened[?]," *not* as a comment on defendant's failure to testify, but rather an explanation or instruction on how the jury should perform its duty and interpret the evidence. Unlike a case involving forensic or documentary evidence of abuse, the prosecutor explained that this case turned primarily on witness credibility and that attorneys' statements—including questions on cross—were not evidence, and thus the jury should focus on what the witnesses had said.[4] Nowhere did the prosecutor reference—directly or indirectly—the defendant's decision not to testify. (See *People v. Medina* (1995) 11 Cal.4th 694, 756 ["prosecutor's remarks, viewed in context, can only be seen as a fair comment on the state of the evidence . . . outside the purview of *Griffin*"].)

Because defense counsel had no cause to object to the prosecutor's statement, no claim of ineffective assistance arises. (See *People v. Medina, supra,* 11 Cal.4th at p. 756 [because the statement fell outside *Griffin*'s purview, the failure to object was justifiable and not incompetent representation].)

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[4] The prosecutor's statements also were consonant with the jury instructions that were given, including CALCRIM No. 222, which stated in relevant part: " '*Evidence*' *is the sworn testimony of witnesses*, the exhibits admitted into evidence, and anything else I told you to consider as evidence. Nothing that the attorneys say is evidence. In their opening statements and closing arguments, the attorneys discuss the case, but their remarks are not evidence. Their questions are not evidence. *Only the witnesses' answers are evidence.* The attorneys' questions are significant only if they helped you to understand the witnesses' answers." (Emphasis added.)

II

Reference to Facts Not in Evidence

Defendant next contends the prosecutor improperly suggested to the jury that the video of the victim's SAFE interview contained favorable evidence and but for circumstances beyond the prosecution's control, the jury would have received it. He points to the prosecutor's statement: " 'Questions were asked of [the victim], but we don't actually have that DVD in evidence, and that is simply because the law does not allow it based on her age, and **that is a legal ruling that the Court has made.** So you get what you get, and **you don't get to wish you had something else when it comes down to the evidence that you get to consider**.' " (Defendant's emphasis.) He adds that the victim's SAFE interview was not actually offered by any party, so it was inaccurate to characterize its exclusion as a legal ruling by the trial court. We find no error.

A. *Background*

Before closing arguments, the trial court specially instructed the jury as follows: "You heard that there were SAFE interviews for four children. The recordings of two children were played to you in their entirety. The decision to play only two was made by the Court according to law, and you should not speculate about the reasons for this decision."

Later, during closing, the prosecutor explained that the jury was limited to the evidence presented at trial: "If we are looking at documentary evidence, it has to have something that has got an exhibit sticker on it . . . . It could be the DVDs of the interviews of [the sister and cousin]. Those are items of evidence that can be reviewed."

He continued: "I mentioned in opening the [victim's] SAFE interview, we heard something about it through [the detective who testified]. Questions were asked of [the victim], but we don't actually have that DVD in evidence, and that is simply because the law does not allow it based on her age, and that is a legal ruling that the Court has made.

So you get what you get, and you don't get to wish you had something else when it comes down to the evidence that you get to consider."

B. *Analysis*

Impermissible vouching may occur where the prosecutor suggests information not presented supports the witness's testimony. (*People v. Williams* (1997) 16 Cal.4th 153, 257.) Here, no such vouching occurred.

Read in context, the prosecutor was not, as defendant argues, employing paraleipsis to draw the jury's attention to evidence not before it. Rather, the prosecutor was again commenting on the state of the evidence, in much the same way that the trial court had done. The victim's SAFE interview was mentioned in the opening statement, the victim had referred to it in her testimony, a detective testified to it, and portions of it were read to the jury. Yet the victim's SAFE interview was not in evidence—while the sister's and cousin's were. As such, it was reasonable for the prosecutor to comment on its absence: "that is simply because the law does not allow it based on her age," which paralleled the trial court's instruction.[5] The comment in no way implied the existence of additional favorable evidence in the interview recording. Thus, defense counsel again had no cause to object, and no claim of ineffective assistance lies.

III

Claim of Improper Recitation and Factual Misstatement

Defendant next argues prosecutorial misconduct in the improper recitation and misstatement of a fact on a key disputed issue. He points to the prosecutor's statement:

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[5] Like the trial court, the prosecution did mischaracterize the omission of the victim's SAFE video as a court ruling, rather than a decision by the prosecutor not to offer the evidence. However, this mistake could have been addressed by requesting a modified special jury instruction. The failure to do so forfeits the claim. (*People v. Mora and Rangel* (2018) 5 Cal.5th 442, 471 ["failure to object to wording of jury instruction forfeits appellate claim of error"].) Regardless, the error would be harmless under any standard of prejudice.

"Because remember, in 2012 when [the victim] had the SAFE interview, when she spoke with the people—you know, February of 2012 she sort of thought back and said, well, as I recall it would have been the previous Thanksgiving or thereabouts was the last time." Defendant claims the prosecutor was purporting to recount the contents of the victim's SAFE interview, a document not admitted into evidence. Further, the prosecutor misstated the contents of that interview, as Thanksgiving was mentioned by the witness in an unrelated context. We disagree.

A. *Background*

During closing arguments, the prosecution walked the jury through the counts: "So the first one, Count 1, the Defendant touched [the victim's] vagina the first time. And we saw her in Court. We asked her, . . . I want you to think in your mind [of] a time when this would have happened, because she said it happened a lot of times, . . . more times than she can remember since she was a very young girl, second and third grade, and it went on until sometime it sounded like in 2011. Because remember, in 2012 when she had the SAFE interview, when she spoke with the people—you know, February of 2012 she sort of thought back and said, well, as I recall it would have been the previous Thanksgiving or thereabouts was the last time. So it went on for several years . . . ."

B. *Analysis*

We disagree with defendant's characterization of the prosecutor's statement as a reference to a statement made during the victim's SAFE interview. A close reading of the entire exchange shows the prosecutor was recounting the portion of the victim's trial testimony during which she was asked about the last time defendant touched her:

"Q. [W]hat was the last time that the Defendant touched you?

"A. I don't remember the time, but I remember it was before Christmas.

"Q. What grade were you in?

"A. I think I was middle of eighth

"Q. Okay. When you say Christmas, do you remember the year that would have been?

"A. No.

"Q. Okay. Was that the Christmas before you went and gave the interview at the SAFE Center?

"A. Yes."

Thus, at closing, the prosecutor was recounting how he had asked the victim about the last time defendant molested her, and she had recalled it was before Christmas. When she could not remember the year, the SAFE interview was used as a landmark.[6]

To be sure, the victim said Christmas, not Thanksgiving. Defense counsel could have objected to correct that misstatement, but the failure to do so does not constitute ineffective assistance as it could not have affected the outcome under any standard of prejudice.

IV

Implying Acts that Occurred When the Victim was Seven Could Support a Conviction

Defendant next argues the prosecutor improperly implied that acts occurring when the victim was seven could support a conviction. He points to the prosecutor's statements during closing argument that the victims were "seven, eight years old" when defendant began molesting them and notes the information did not charge acts committed before the victim turned eight years old. He maintains reversal is required because the

[6] By contrast, in the portion of the SAFE interview to which defendant maintains the prosecutor was referring, the victim recalled an occurrence of touching. The interviewer asked if it had occurred before Christmas. When the victim said it had, the interviewer asked if it had happened since Christmas. The victim responded no. The interviewer then said: "No, okay so last time was before Christmas of eighth grade. Um, do you guys celebrate Thanksgiving?"

record does not demonstrate the jury did not consider defendant's acts when the victim was seven. We disagree.

A. *Background*

The prosecutor's closing argument began: "It always happened the same way each time this Defendant would start molesting his daughters [the victim and her sister]. They both said he would begin to rub my arm, my shoulder, my stomach, before his hand would move down and touch them on the vagina. This happened from the time they were seven, eight years old in second or third grade up until junior high school age . . . ."

Later, the prosecutor said, "And the last thing, was the victim under fourteen. In this case there is—the testimony has been very consistent that it started when the girls were seven or eight and ended well before they were fourteen."

Earlier in the trial, the victim answered, "Around seven, eight" years old, when asked how old she was when defendant started touching her vagina. And in the sister's SAFE interview, which was played for the jury, the sister answered, "I was about eight, seven" when asked the first time defendant touched her.

B. *Analysis*

We again disagree with defendant's characterization. The prosecutor never implied acts occurring when the victim was seven could support a conviction. The prosecutor was merely paraphrasing testimony of the victim and the victim's sister. The jury was clearly instructed that counts one and two had to have occurred within a circumscribed date range corresponding to the victim's eighth birthday and continuing to just before the SAFE interview. We presume that instruction was followed. (See *People v. Case* (2018) 5 Cal.5th 1, 32.) As such, there was no ineffective assistance.

V

Claim Regarding Unanimity

Defendant was charged in counts one and two with committing two counts of lewd or lascivious acts over a five-year period. The first count was charged as the "first time" and the second count was charged as the "last time."

Defendant contends the prosecutor committed misconduct by suggesting the jury need not agree on a specific instance of touching, despite the unanimity instruction. He concedes the jury had been instructed with CALCRIM No. 3500, requiring it to unanimously agree on which acts defendant committed. He maintains that, contrary to that instruction, the prosecutor implied that the prosecution had met its burden of proof on counts one and two because the victim had testified that defendant had touched her vagina between 10 and 20 times. He points to the statement: "But the way it is charged and the way the verdict forms will read is touched [the victim's] vagina first time and touched [the victim's] vagina last time. And the reason why it is charged this way is this, we know it happened more than once, we know it happened multiple times. . . . **But what we do know is by definition there had to be a first and there had to be a last.** So that is why we charged it this way." (Defendant's emphasis.) We disagree with defendant's interpretation of the record.

A. *Background*

Before closing arguments, as to counts one and two, the trial court instructed the jury:

"The defendant is charged with committing a lewd and lascivious act, rubbed vagina the first time of [the victim], in count l, sometime during the period . . . 2006, and February 6, 2012. The People have presented evidence of more than one act to prove that the defendant committed this offense. You must not find the defendant guilty unless you all agree that the People have proved that the defendant committed at least one of these acts and you all agree on which act he committed. [¶] . . . [¶]

"The defendant is charged with committing a lewd and lascivious act, rubbed vagina, last time, of [the victim], in count 2, sometime during the period of . . . 2006, and February 6, 2012. The People have presented evidence of more than one act to prove that the defendant committed this offense. You must not find the defendant guilty unless you all agree that the People have proved that the defendant committed at least one of these acts and you all agree on which act he committed."

The court also instructed: "You must follow the law as I explain it to you . . . . If you believe that the attorneys' comments on the law conflict with my instructions, you must follow my instructions."

During closing arguments, the prosecutor explained that the victim had testified defendant had touched her vagina "more times than she can remember since she was a very young girl . . . and it went on until sometime it sounded like in 2011." He noted, however, "the way it is charged and the way the verdict forms will read is touched [the victim's] vagina first time and touched [the victim's] vagina last time. And the reason why it is charged this way is this, we know it happened more than once, we know it happened multiple times. Do we know how many? No. More than ten? Your guess is as good as mine. I mean, we just don't know, okay? But what we do know is by definition there had to be a first and there had to be a last. So that is why we charged it this way. Does that mean maybe there is some that—you know, he got some free ones that aren't charged? You know what, that's really not for us to consider. This is fair, and that is what this process is about . . . being fair and looking at the charges that we can prove. So we can talk about a first time and a last time, even though we know it happened multiple times."

B. *Analysis*

The state constitution guarantees a unanimous verdict on a specific charge. (Cal. Const., art. I, § 16.) If conviction on a single charge could be based on evidence of two or more discrete criminal acts, all jurors must agree that the defendant committed the

same act. If the prosecution does not elect to rely upon a single criminal act, the trial court has a duty to instruct the jury that it must unanimously agree beyond a reasonable doubt that the defendant committed the same specific act. (*People v. Russo* (2001) 25 Cal.4th 1124, 1132 .) This eliminates the risk that the defendant will be convicted " 'even though there is no single offense which all the jurors agree the defendant committed.' " (*Ibid.*)

Here, no ineffective assistance arose from trial counsel's failure to object because the prosecutor never implied the jury could ignore the unanimity instructions that were given as to counts one and two. The prosecutor conveyed only that the prosecution had opted to charge only two counts of lewd or lascivious acts, and the jury was to select the first and the last instance it could agree upon (if any).

Even if the prosecutor's statement could be read to create tension with the unanimity instruction, the jury was instructed that if an attorney's instruction conflicts with the court's, the jury is to follow the court's instruction. We presume the jury followed that instruction and unanimously agreed that the People proved beyond a reasonable doubt that defendant committed a first and a last act, and further agreed on which acts those were. (See *People v. Boyette* (2002) 29 Cal.4th 381, 436 [the court presumes the jury followed the instruction that when the attorney's description of the law conflicts with the trial court's, the jury is to follow the court's instruction]; *People v. Sanchez* (2001) 26 Cal.4th 834, 852 ["Jurors are presumed able to understand and correlate instructions and are further presumed to have followed the court's instructions"].)

DISPOSITION

The judgment is affirmed.

KRAUSE, J.

We concur:

RAYE, P. J.

BLEASE, J.